UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF
C-14J

February 6, 2006

VIA EMAIL & REGULAR 1st CLASS MAIL

Wilson P. Funkhouser, Esq.
Funkhouser, Vegosen, Liebman & Dunn LTD
55 W. Monroe Street
Suite 2410
Chicago, IL 60603

Re: Innocent Landowner Assertion
CERCLA §101(35)(A) iii
LaSalle Bank N.A. Trust Number 39369
245-253 E. Ohio, 242-256 E. Grand Avenue,
Chicago, IL

Dear Mr: Funkhouser:

Thank you for your letter dated January 5, 2006 regarding the status of your client who is the current owner of the property located at 245-253 E. Ohio, 242-256 East Grand Avenue, Chicago, Illinois ("245 E. Ohio" or the "Property"). Your letter was in response to my November 30, 2005 letter which discussed your client's innocent landowner assertion and explained that in 1994 when your client removed the Underground Storage Tanks ("UST") from the Property, apparently exercising "due care" in accordance with state and federal environmental regulations, the associated excavation work caused a threat of release of thorium. That letter explained that Section 101(35)(D) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq. as amended ("CERCLA") precludes the assertion of any innocent landowner defense by a person who caused or contributed to a release of a hazardous substance from this property, regardless of whether that person exercised due care or had no reason to know thorium was present. That conclusion is an unfortunately harsh result for your client who has acted cooperatively and has demonstrated attentiveness to environmental concerns.

Your January 5, 2005 letter notes that I had incorrectly identified the UST removal as having taken place in the northwestern quadrant of the property. You are quite correct that the UST were formerly located in the northeastern quadrant of the property. Your letter also

emphatically expresses your opinion that during the excavation for the UST removal there was no threat of release of thorium. You base that opinion upon three factors. The first is your contention that the "absence of elevated radiation emissions at any point from the surface to native sands in the area of that [UST removal] zone" demonstrates that there was no threat of a release. Second, you believe all the excavated overburden was placed back into the excavation hole and that action thereby foreclosed the potential for any release. Third, you believe that Seventh Circuit caselaw supports your conclusion that there was no threatened release of thorium from the Property.

While I readily acknowledge that CERCLA Section 101(35)(D) treats your client's circumstances harshly, especially as it appears that at the time of the UST removal, your client was taking appropriate steps to exercise due care, U.S. EPA can not turn a blind eye to CERCLA's statutory language nor arbitrarily ignore obvious evidence of a threat of release of thorium.

At this point, it may be helpful to revisit that statutory language in question. CERCLA Section 101(35)(D) states that "[n]othing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility." CERCLA Section 101(22) defines "release" to mean "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment ..." (Emphasis added.) Consequently, only discharges "into the environment" are releases. Under CERCLA Section 101(8), "environment" is broadly defined and includes surface water, ground water, land surface or subsurface strata, and ambient air within the United States or under the jurisdiction of the United States.

The first question is whether the UST removal activities caused a "threat of release." The UST removal activities are described by the April 20, 1994, 45 Day Report -Incident #94-0293 submitted by Miller Environmental Management, Inc. to the Illinois Environmental Protection Agency Leaking Under Storage Tank Section ("Report") which is attached to this letter.[1] The Report states that 50-75 cubic yards of backfill/overburden material was removed. The Attachment 5 Site Photos to the Report clearly show an excavator digging a hole at the site, apparently excavated materials placed in a pile or piles on the ground, a person standing on an underground storage tank within an excavation and several people and vehicles in the vicinity of the excavation. The Report at paragraph 1.B. indicates the exterior surfaces of the UST were

[1]U.S. EPA obtained the attached copy of the Report from IEPA. U.S. EPA received a copy of same report from you, however, the site photograph copies were dark and difficult to see.

hand scraped. The Report at paragraph 3. states, the same day the overburden was removed it was placed back in the excavation and covered with off-site fill.

The next step in the analysis is to determine whether the UST removal activities caused a "threatened release." You suggest that because elevated radiation levels were not found in soil borings that neighbor the UST removal area that there was no threat of release of thorium from the UST excavation activities. If you compare the soil borings surrounding the area of elevated gamma readings in the northwest quadrant "hot spot" to the UST removal area, many of the readings surrounding the UST removal area are equal to and even higher than those soil boring readings in the area surrounding the "hot spot." For instance, in your Fairbank and Ohio Soil Boring Locations, Figure 3, Counts Per Minute -Two Foot Interval, SB-15 has reading of 14, 256 cpm while the neighboring SB-14 has a reading of 234,427 cpm more than 16 times higher than SB-15. In the same figure, near the UST removal area, SB-46 has a reading of 14,596 cpm. Thus, the lack of elevated soil boring radiation readings in vicinity of the UST removal does not demonstrate there was no threat of release. The soil borings were placed on a 5-meter grid. As we have explained in meetings over the past two years, when overburden exceeding 18 inches in depth or density is present, radiation equipment can not detect elevated levels of contamination that may be present. As you know, that is why, if a property owner wishes U.S. EPA to state there are no elevated levels of radioactively contaminated soils at the property, the owner must radioactively survey the soils in 18 inch lifts or sections to native soils. The mixing of the excavated soils may have also diluted thorium concentrations present.

Further, at several other Lindsay Light thorium removal sites, U.S. EPA has learned that due to the radiation detection limitations, what you term "extensive radiological assessment activities" (i.e. the 5 meter grid soil borings), while they are useful finding tools, still at best, they are a limited indicator, of where radioactive contamination may be located. For instance, at another Lindsay Light Operable Unit where a removal action is currently underway and not even 50% complete, the volume of radiologically impacted soils excavated to date is nearly twice the initial "conservative" estimate, which was based upon a 5-meter grid boring investigation. This pattern of finding several times more material than estimated is quite common at the Lindsay Light thorium contamination sites. Consequently, the lack of neighboring elevated gamma readings should not be used an as indicator to support the conclusion that the soils in and adjacent to the UST excavation were not radioactively contaminated and therefore did not cause a threatened or actual release of thorium.

U.S. EPA believes a "threat" of a release exists whenever heavy equipment, such as an excavator, operates at a radioactively contaminated property especially when exclusion zones have not been identified. Obviously, excavating soils and placing them on the ground can cause a release but a release of a hazardous substance may also result from tracking contaminated materials over and off the site. The UST soil excavation and management activities involved the placement of subsurface soils on the ground where the materials were subject to wind dispersal,

hand scraping, and tracking by foot and by vehicles' tires and excavating equipment. When heavy equipment and vehicles are used at a radioactively contaminated site, where exclusion zones have not been identified, before leaving the site, heavy equipment, vehicles, and individuals are radiologically surveyed and decontaminated as necessary to prevent the spread of radiologically impacted materials.

The next element of the analysis is whether there was threat of release to the "environment." It seems that you do not believe there was a threat of release to the environment because the excavated overburden was put back into the hole from whence it came. But the act of excavating itself and discharging the material to the surface of the ground, disposing of the material into the excavation and other associated activities are what caused the threat of release. In support of your claim that the UST cleanup activities did not cause a release to the environment, you cite to Covalt v. Carey Canada Inc., 860 F. 2d 1434 (7th Cir. 1988). Covalt involved an Indiana worker diagnosed with asbestosis and lung cancer seeking compensation for his injuries from suppliers that furnished asbestos to the company where he worked and was exposed to asbestos. The worker sought to bring an action for personal injury using the exception to state statute of limitations provided in Section 309(a)(1) of CERCLA. After discussing workmen's compensation for injuries in a "workplace," the Court stated "[a] place where work is being carried out is not the "environment" for purposes of the Superfund Act." Obviously, out of context that statement makes no sense. There are likely hundreds of CERCLA sites, including your client's property, where "work is being carried out" which are indeed the "environment" as defined by CERCLA. But the Covalt court then adds context with its explanation that the "[to the environment] text makes more sense if read to refer to more widespread releases that affect strangers: asbestos wafting out of Proko's plant and contaminating a nearby meadow, or shaken loose from insulation Proko installed in a school; asbestos left behind as a contaminant when Proko closes its plant; fluids leaching into the water supply from a plant, and so on." Finally, Covalt concludes "[t]he Superfund Act regulates waste dumps and other leakages "into the environment." The interior of a place of employment is not "the environment" for purposes of CERCLA -- at least to the extent employees are the injured persons -- and § 309(a)(1) therefore does not apply to Covalt's claim." Covalt, 860 F. 2d 1434. That holding is consistent with the CERCLA statutory definition of "environment" (which Covalt did not discuss or even acknowledge) and suggests that excavation, wind dispersal, and tracking during the UST removal activities may cause a release to the environment. Covalt can not be relied upon to support a claim that during the out-of-doors UST removal work there can be no threat of release of thorium to the environment.

"Threatened release" is not statutorily defined and the statutory language does not impose any quantitative requirement, e.g. degree of risk, on the term "threatened release." The agency and courts have interpreted it broadly, see New York v. Shore Realty Corp., 759 F.2d 1032, at 1038 and n. 4, 1045 ("release" includes leaking tanks and pipelines); U.S. v. Metate Asbestos, 584 F. Supp. 1143, at 1149 ("release" includes transport of asbestos by the wind), "to

avoid frustrating the beneficial legislative purposes." Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, at 1081 (1st Cir. 1986). Also, in Amoco Oil v. Borden, Inc., 899 F.2d 664, at 669, the court concluded that the placement of radioactive wastes on the property and the radioactive decay products emitted from the radionuclides constituted a release within the meaning of CERCLA. If today, without benefit of radiological surveillance and precautions, your client excavated 50-75 cubic yards of material at the UST removal location, placed that material on the surface, and disposed of the material in the excavation and covered the excavation, those actions would have caused an imminent and substantial endangerment to the public health because of a threatened release of thorium. Your client operated an excavator at the site 12 years ago without benefit of radiological surveillance. That work, which was intended to benefit the environment, nonetheless created a risk of release of thorium. When we earlier discussed your client's innocent landowner status, I had not realized the full extent of the UST excavation. But my oversight does not negate the fact that the Report and attached Site Photos from IEPA clearly depict a threat of release of thorium contaminated soils.

You have argued, that your client may have caused a threat of release during the UST removal only if thorium contaminated soils are found to be present in or immediately adjacent to the area excavated for the UST removal. Accepting *arguendo* that position, your client still faces a possibility that thorium contaminated soils may be present in or adjacent to the UST removal area. As explained in my November 30, 2005 letter, your client ultimately must demonstrate to a court that it meets the requisite statutory conditions in order to use the third-party, innocent landowner defense afforded by CERCLA.

You have earlier explained to U.S. EPA that your client intends to retain an interest in the Property that it conveys to a CERCLA Section 101(40) bona fide prospective purchaser. CERCLA Section 101(40) precludes bona fide prospective purchasers from having an affiliation with any person that is potentially liable, for response costs through:

> "any contractual , corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed, or by a contract for the sale of goods or services)." Emphasis added.

Note therefore, regardless of your client's potential CERCLA liability that the structure of your relationship with a purchaser may nonetheless accommodate a bona fide prospective purchaser.

U.S. EPA appreciates the your client's patience and cooperation following the discovery of thorium contamination at this property and hopes this information is useful to you as you prepare to sell this property. If you have questions regarding the contamination or the cleanup work, your client's contractor is encouraged to work with Verneta Simon, On-Scene Coordinator, at (312) 886-3601. For legal questions, please contact me at (312) 886-4683 or Cathleen Martwick, Associate Regional Counsel, at (312) 886-7166.

Sincerely,

for Mary L Fulgh

Mary L. Fulghum
Associate Regional Counsel

Attachment

cc: Thomas Carey, Bell Boyd
Cathleen Martwick, ORC

bcc: Verneta Simon, SE-5J
Gene Jablonowski, SMF-4J
Larry Jensen, SMF-4J